Supreme Court, U.S.
FILED
MAR 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1038

In the Supreme Court of the United States

OCTOBER TERM, 1988

DIKRAN BERBERIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12 pp

QUESTIONS PRESENTED

1. Whether the court of appeals applied the proper standard in affirming petitioner's conviction for conspiracy.

2. Whether there was sufficient evidence to show that petitioner aided and abetted the interstate transportation of an explosive.

3. Whether petitioner waived his right to argue a violation of the Speedy Trial Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 851 F.2d 236.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1988. A petition for rehearing was denied on November 2, 1988. The petition for a writ of certiorari was filed on December 22, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of conspiracy, in violation of 18 U.S.C. 371 (Count

1), and of aiding and abetting the interstate transportation of explosive material, in violation of 18 U.S.C. 844(d) (Count 2). He was sentenced to consecutive terms of five years' imprisonment on Count 1 and ten years' imprisonment on Count 2. The court, however, suspended all but six months of the ten-year term in favor of five years' probation.

1. The evidence at trial, which is summarized in the opinion of the court of appeals (Pet. App. A1-A11), showed that petitioner participated in a scheme to bomb the Honorary Turkish Consulate in Philadelphia. In September of 1982, the FBI, as part of an ongoing investigation of Armenian terrorist groups, obtained authorization from the United States Foreign Intelligence Surveillance Court (USFISC) to place a wiretap on co-defendant Viken Hovsepian's telephone in California. Although petitioner and four other participants spoke in Armenian and used code words, FBI translators and investigators were able to crack the code and learn of the plot against the Turkish Consulate. Pet. App. A4.

The FBI intercepted four conversations between petitioner and Hovsepian in which they arranged meetings. In two conversations the men spoke in code; in one conversation petitioner stated that he did not want to discuss their plans over the telephone. In October 1982, petitioner bought a wooden H-block, a circuit tester, and a Timex watch, which he delivered to his co-defendants at an Armenian church. On his way to the church, petitioner circled the area as if checking for surveillance. After driving away from the meeting, petitioner parked, walked to the sidewalk, and looked up and down the street. A few minutes later, he drove away, made a U-turn, and went back home. Later that evening he drove his car in circles around the neighborhood as if looking for surveillance. Pet. App. A4.

Based on its electronic surveillance, the FBI concluded that a bomb or its components were being moved the following day from Los Angeles to Boston on a particular flight. FBI agents put the plane's luggage through an x-ray scanner and detected parts of a bomb in a suitcase. They opened the suitcase and found all the components necessary for a bomb, including those items bought by petitioner—a wooden H-block, a circuit tester, and a Timex watch. Pet. App. A4-A5.

2. The court of appeals affirmed petitioner's convictions (Pet. App. A1-A11). With respect to the conspiracy count, the court concluded (Pet. App. A6) that the evidence was sufficient to show that petitioner knowingly helped create a bomb that would be used to blow up the Turkish Consulate in Philadelphia. With respect to the aiding and abetting charge, the court rejected (Pet. App. A7) petitioner's contention that the government was required to prove that he had specific knowledge that the bomb was to be transported in interstate commerce. Finally, the court of appeals rejected (Pet. App. A8) petitioner's claim that his case should have been dismissed for a violation of the Speedy Trial Act. Without reaching the merits of petitioner's claim, the court held that petitioner had failed to make a timely motion to dismiss for an alleged violation of the Act and had therefore waived his right to dismissal. The court rejected petitioner's contention that his oral request for dismissal on the first day of trial related back to his earlier motion, which was made on different grounds and had been previously denied. The court stated that petitioner "was required to make a new and timely pretrial motion to dismiss under the Speedy Trial Act" when new grounds allegedly arose for such a motion (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 9-17) that the court of appeals improperly affirmed his conspiracy conviction on the basis of only "slight evidence" of his participation in the conspiracy. Petitioner, however, has ignored both the weight of the evidence supporting his conviction as well as the plain language of the court of appeals' opinion.

a. Petitioner conceded in the court of appeals that a conspiracy existed to bomb the Turkish Consulate in Philadelphia; his contention was that he was an unknowing instrument of the conspirators. See Pet. App. A6. The evidence, however, amply supported petitioner's knowing participation in the conspiracy. Petitioner had telephone conversations in September and October 1982 with co-defendant Hovsepian who, as petitioner acknowledged, planned with others to bomb the Consulate. In those recorded conversations, petitioner and Hovsepian arranged to meet at various places, some of which were identified in code. One of those meetings was scheduled to take place on October 19, 1982. Two days after that scheduled meeting, petitioner purchased two Duracel batteries, one "H" shaped wooden block, a toggle switch, wire nuts, a volt/ohmmeter and a Timex wristwatch—all of which were materials necessary to construct the explosive device. See Gov't C.A. Br. 5-6, 9.

Later that same day, petitioner was observed by surveillance units driving from his residence to an Armenian church in California. During his trip, petitioner drove in an evasive manner. At the church, petitioner met with co-defendant Steven Dadaian and was present when Dadaian placed the bomb components into a suitcase along with explosives. That suitcase was recovered by federal agents the next day at Logan International Airport in Boston, Massachusetts. When they opened the suitcase,

the agents found items identical to those purchased by petitioner. The suitcase was removed from an airplane on which Dadaian had traveled to Boston. Gov't C.A. Br. 5-6, 9.

On the basis of that evidence, the jury properly found that petitioner was a willing participant in the conspiracy to bomb the Consulate. The evidence showed that he had purchased the components for the timing mechanism of the bomb found in the suitcase at Logan International Airport. The timing mechanism had no plausible purpose other than to set off explosives such as the blasting cap and dynamite that were found in the same suitcase. Petitioner also bought the ohmmeter found in the suitcase; that device would ensure the proper wiring of the bomb prior to its detonation. Petitioner's purchases, viewed together with petitioner's presence at the Armenian church when the components of the explosives were placed in the suitcase and his use of counter-surveillance tactics on the way to and from the church, provided an ample basis for the jury to infer petitioner's knowing participation in the conspiracy.

b. Petitioner focuses on the court of appeals' statement that once the existence of a conspiracy is established, "evidence of only a slight connection to the conspiracy is necessary in order to convict any one defendant of knowing participation in it" (Pet. App. A6). That statement, he claims, indicates that the court of appeals—in conflict with other circuits—was applying a more lenient standard in reviewing the sufficiency of the evidence of conspiracy from that applicable to the sufficiency of the evidence of other crimes. That is not the effect of the quoted language.

The Ninth Circuit's reference to the "slight connection" needed to connect a defendant with a conspiracy does not mean that a defendant may be convicted of conspiracy on only "slight evidence." Rather, it means that a defendant

can be convicted of conspiracy if the jury reasonably finds, beyond a reasonable doubt, that the defendant was a party to the conspiracy, even if the defendant played a minor role or was a tangential figure in the conspiratorial scheme. The Ninth Circuit has made that point explicit in several cases, where it has explained that the term "slight" modifies "connection" and not "evidence," so that while a slight connection with a conspiracy suffices to convict one for conspiracy, "the government must prove beyond a reasonable doubt that the defendant knew of his connection to the charged conspiracy." *United States* v. *Meyers,* 847 F.2d 1408, 1413 (9th Cir. 1988). Thus, the evidence must establish "beyond a reasonable doubt a knowing connection of the defendant with the conspiracy, even though the connection is slight" (*ibid.*). See also *United States* v. *Loya,* 807 F.2d 1483, 1488 (9th Cir. 1987) ("Although the connection of the accused to the conspiracy may be slight, such evidence must be sufficient to satisfy a rational juror beyond a reasonable doubt."); *United States* v. *Huber,* 772 F.2d 585, 589 (9th Cir. 1985) ("slight connection between [the defendant] and the conspiracy is sufficient once the necessary intent is established"); *United States* v. *Bailey,* 607 F.2d 237, 243 (9th Cir. 1979) ("Once the existence of a conspiracy is established, evidence establishing beyond a reasonable doubt a connection of a defendant with the conspiracy, even though the *connection is slight,* is sufficient to convict him of knowing participation in the conspiracy") (emphasis in original; citation omitted). In short, the Ninth Circuit applies precisely the same standard that petitioner himself commends (Pet. 14-15) the First Circuit for applying in *United States* v. *Marsh,* 747 F.2d 7, 13 (1st Cir. 1984).

2. Petitioner renews his contention (Pet. 17-20) that the evidence was insufficient to support his conviction for aiding and abetting the interstate transportation of ex-

plosive materials. Specifically, he claims that there was no proof that he was involved in the interstate transportation of the bomb. The court of appeals correctly rejected that argument (Pet. App. A7). The government presented overwhelming evidence that petitioner knowingly aided and abetted the assembly of the bomb, anticipating its transportation from California to Boston. The explosive transported by petitioner's co-defendant Dadaian was composed of parts supplied by petitioner. The jury properly concluded that petitioner provided these parts in California as part of a conspiracy to blow up the Turkish Consulate in Philadelphia. Interstate transportation of the bomb was thus clearly contemplated by the co-conspirators, and petitioner's procurement of the parts for the bomb plainly aided and abetted its interstate transportation. Cf. *United States* v. *Fraley,* 858 F.2d 230, 232-233 (5th Cir. 1988), cert. denied, No. 88-6094 (Jan. 17, 1989).

In any event, the statute at issue here, 18 U.S.C. 844(d), provides that a person who "transports [any explosive] in interstate commerce" must do so "with the knowledge or intent that [the device] will be used to kill, injure, or intimidate." The language does not suggest any requirement of a specific intent to transport the device in interstate commerce, but only the fact of interstate transportation. Thus, the courts of appeals that have considered this question have concluded that scienter as to the interstate transportation element is not required. *United States* v. *Michaels,* 796 F.2d 1112, 1117 (9th Cir. 1986), cert. denied, 479 U.S. 1038 (1987); *United States* v. *Carlson,* 561 F.2d 105 (1st Cir.), cert. denied, 434 U.S. 973 (1977). Cf. *United States* v. *Feola,* 420 U.S. 671 (1975) (defendant need not be aware of officer's federal status in order to be subject to prosecution for assaulting a federal officer); *United States* v. *Duncan,* 855 F.2d 1528, 1536-1538 (11th Cir. 1988), petition for cert. pending, No. 88-6217 (filed

Dec. 30, 1988) (knowledge of crossing state lines not required in kidnapping offense; requirement that offender cross state lines merely furnishes basis for exercise of federal jurisdiction). There is no conflict among the circuits on this issue and thus no reason for further review.

3. Finally, petitioner claims (Pet. 20-22) that his case should have been dismissed because the government violated the Speedy Trial Act by failing to begin trial within 70 days of his indictment (18 U.S.C. 3162(a)(2)). Petitioner however, failed to raise that Speedy Trial Act claim prior to trial. On the first day of trial, he argued that the indictment should be dismissed on constitutional grounds; his argument relied on a Sixth Amendment decision of this Court, *United States* v. *Loud Hawk*, 474 U.S. 302 (1986), and did not refer to the Speedy Trial Act at all. Tr. 15-17. He now relies on a collection of documents he submitted at that time. Those documents, however, merely reflected the arguments he had previously made in the court of appeals on a prior appeal in this case. See Tr. 17-18; IV Tr. 6-7. Although petitioner referred to the Speedy Trial Act in the caption of that collection of documents, the district court found that the documents did not indicate that the Speedy Trial Act had been invoked in the prior proceeding before the court of appeals (IV Tr. 7); the oblique reference to the Speedy Trial Act in the caption of that collection of previously filed documents was certainly not sufficient to put the court on notice that petitioner intended to rely on the Act as the basis for the motion to dismiss that he filed on the day of trial. See *United States* v. *Tercero*, 640 F.2d 190, 195 & n.6 (9th Cir. 1980), cert. denied, 449 U.S. 1084 (1981); see also *United States* v. *Daly*, 716 F.2d 1499, 1506 n.5 (9th Cir. 1983), cert. dismissed, 465 U.S. 1075 (1984); *United States* v. *Samples*, 713 F.2d 298, 302 (7th Cir. 1983); *United States* v. *Ambrose*, 707 F.2d 1209, 1213-1214 (11th Cir. 1983).

The court of appeals was therefore correct in holding (Pet. App. A8) that petitioner waived his Speedy Trial Act claim by failing to raise it prior to trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1989

U.S. GOVERNMENT PRINTING OFFICE 1989—241 699 00111